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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5662

KEITH PHILLIPS — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID L. ARMSTRONG
ATTORNEY GENERAL

CARL T. MILLER
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

SUZANNE GUSS
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

I. IS THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE LAW PRECLUDING A CRIMINAL CONVICTION IN THE ABSENCE OF CORROBORATION OF AN ACCOMPLICE'S TESTIMONY IS REPEALED AND SAID REPEAL IS APPLIED RETROACTIVELY?

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OPINIONS BELOW

On November 13, 1981, the Kentucky Court of Appeals rendered an unpublished Opinion (No. 81-CA-395-MR) reversing petitioner's conviction for criminal syndication of theft by deception and remanding for a new trial. The Kentucky Supreme Court granted the Commonwealth's Motion for Discretionary Review. The Kentucky Supreme Court reversed the decision of the Court of Appeals granting a new trial for failure to give an accomplice instruction. The case was styled Commonwealth of Kentucky v. Keith Phillips (No. 82-SC-214-D) and the decision is published at Phillips v. Commonwealth, Ky., 655 S.W.2d 6 (1983). On August 31, 1983, the Kentucky Supreme Court denied petitioner's Petition for Rehearing. The decisions above are set out in petitioner's appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3). The Petition for Writ of Certiorari, however, should be denied since petitioner has failed to adequately demonstrate that the Opinion below is in conflict with opinions of this Court and he has failed to adequately demonstrate a conflict of such magnitude as to

warrant review of the Opinion below. This Court has historically decided only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. The respondent believes that the case at bar does not meet the criteria of this Court for a grant of certiorari review of a state court decision. See Supreme Court Rule 17.1.

Under the rules of this Court a writ of certiorari is a matter of judicial discretion and will be granted only when there are very important reasons therefor. The respondent submits that the instant petition fails to set forth any sufficiently important reasons for granting the writ in this case. The issues presented in the petition, while important to the parties involved, are not sufficiently important to the public interest to warrant the grant of a writ of certiorari by this Honorable Court. Further, the issue raised in the petition is concerned with a unique and isolated fact pattern and not likely to recur. The Kentucky Rule of Criminal Procedure in question, RCr 9.62, was abolished effective September 1, 1980. In light of the speedy trial requirement of the Sixth and Fourteenth Amendments of the United States Constitution, and Section 11 of the Kentucky Constitution, it is highly unlikely that a case involving an offense committed prior to the rule's abolition has not yet come to trial, much less a case calling for an instruction pursuant to RCr 9.62. Given the guaranteed right to a speedy trial, any case involving the testimony of an accomplice which has not yet reached trial will undoubtedly involve an offense committed after September 1, 1980. The issue is no longer a live one since the rule upon which the question depends has been

abolished in a manner which will prevent the problem from arising in the future. Petitioner has not shown that there are any pending or potential cases that would be controlled by resolution of this conflict, other than Murphy v. Commonwealth of Kentucky, No. 83-5352 which is currently pending before this Court. In fact, a conflict does not warrant the granting of certiorari where the statute which is the source of the controversy has expired or been amended so as to eliminate a future problem, notwithstanding a substantial number of pending or potential cases which would continue to be affected or determined by a resolution of the issue. See R. L. Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-467 (1953), and the analysis of the following cases contained therein: United States v. Abrams, 197 F.2d 803 (6th Cir. 1952), cert. denied, 344 U.S. 855 (1952); United States v. Community Services, Inc., 189 F.2d 421 (4th Cir. 1951), cert. denied, 342 U.S. 932 (1952); Beal v. United States, 182 F.2d 565 (6th Cir.), cert. denied, 340 U.S. 852 (1950). If certiorari was denied in the preceding cases where there existed a number of potential or pending cases presenting the issue, the granting of certiorari is unwarranted in the instant case where it is clear that abolition of the rule has eliminated future controversy and there exist no substantial numbers of pending cases to be affected by resolution of the issue.

STATEMENT OF THE CASE

On June 2, 1980, the Lyon Circuit Court returned an indictment charging petitioner with criminal syndication of theft by deception pursuant to Kentucky Revised Statute (KRS)

506.120 and KRS 514.040 (Transcript of Record, hereinafter TR, 1). A criminal syndicate is defined as five or more persons collaborating to promote or engage in a variety of offenses, including theft, on a continuing basis. KRS 506.120(3). To obtain a conviction for the offense charged the Commonwealth was required to prove that petitioner, "with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities" organized the syndicate, managed or directed the activities of the syndicate, knowingly furnished managerial services to the syndicate or a host of other activities. KRS 506.120(1)(a)-(g).

Trial commenced on October 15, 1980. Richard Norris, an inmate and companion of petitioner at Kentucky State Reformatory and Kentucky State Penitentiary, testified that petitioner invited him to participate in a credit card scheme after meeting petitioner at the Kentucky State Reformatory in January, 1980 (Transcript of Evidence, hereinafter TE, 215). Norris observed petitioner use Norris' date of birth and social security number in order to obtain a credit card from J. C. Penney's, through use of the prison yard telephone (TE 215). Norris used the account on several occasions to obtain merchandise for another inmate (Arthur Ray Penrod), to whom he was indebted and to obtain merchandise which was delivered to a woman in Lexington (TE 217-219). Penrod agreed to this arrangement and selected several items from the Penney's catalog which Norris ordered by telephone from the J. C. Penney's in Southland Terrace (TE 219).

Norris explained that petitioner would pose as a credit manager of a Penney's store and would call in a credit application to the regional office (TE 220-221). The office

would then give petitioner an account number (Id.). Petitioner learned the mechanics of obtaining an account number from an individual named Dave who worked at the Southland Terrace Penney's in Louisville (TE 223). Dave kept Petitioner up-to-date on changes in the system (Id.).

When petitioner and Norris were transferred to the Kentucky State Penitentiary at Eddyville, they befriended inmate Gary Mayes and resumed the credit card scheme (TE 226, 228-230). For safety's sake, Mayes insisted that all merchandise be sent to him not petitioner and he agreed to take full responsibility for it (TE 231). Petitioner placed an order for Mayes which included a television/radio combination, blue jeans and bedding (TE 231-232).

Norris also testified that Myrna Shore a friend of petitioner living in California, was collaborating with petitioner in the scheme and that petitioner planned to send Shore a copy of the instruction sheet containing procedures for obtaining a false credit card from Penney's (TE 235-236). Another west coast friend, Paul Vette, had written petitioner expressing interest in setting up the credit card operation on a nationwide basis (TE 238-239). Norris identified letters introduced into evidence which petitioner had written during his period of segregation. Norris explained that the code words used in the letters pertained to the credit card scheme of which petitioner was the "President" and Norris the "secretary" (TE 250).

Officer Walter DeBoe, a corrections officer at the Kentucky State Penitentiary testified that while randomly monitoring telephone calls made by inmates from telephone booths in the prison yard, he overheard petitioner identify

himself on March 26, 1980 as an employee of J. C. Penney's, call in a credit application to the credit department and obtain a credit card number in the name of M. H. Shore.

Over a period of six weeks Officer DeBoe monitored many of petitioner' calls and recorded most of the conversations (TE 268). Officer DeBoe identified tape recordings of three of the conversations (TE 270). Officer DeBoe had overheard a conversation where petitioner had placed an order with Penney's in the name of K. D. Osborne for a considerable amount of merchandise to be sent to inmate Gary Mayes (TE 271). On April 9, 1980 Mayes was summoned to the mailroom when the merchandise arrived and acted as if he was expecting the merchandise which he accepted (TE 271, 296). The merchandise had been sent from Penney's and included a TV/radio combination, bed coverings and blue jeans (TE 272). The shipment had been sent by "K. D. Osborne" to Gary Mayes (TE 272).

In an interview with Officer DeBoe, the petitioner admitted his involvement in a scheme to obtain credit cards in other people's names and to order merchandise on these credit cards (TE 274). Petitioner admitted that while at the penitentiary "he collaborated with people on the outside to receive merchandise purchased on these credit cards, and that they would in turn at times sell the merchandise and send money to him that they got out of the merchandise" (Id.). Petitioner stated two of the persons involved were Myrna Shore and Billy Floyd (Id.). The petitioner stated that the merchandise was sent to people outside as well as inside the penitentiary (TE 275).

Captain Bill Henderson, in charge of investigations at the penitentiary, also began monitoring the petitioner's

telephone conversations in March, 1980. Captain Henderson related the substance of conversations tape recorded on April 6-7, 1980. Petitioner would obtain credit card numbers and attempt to order merchandise (TE 283). He also monitored calls in which petitioner called other people he had supplied with credit cards and encouraged them to use the cards (TE 284). Petitioner engaged in the credit card operation during the latter part of March and the first of April until he was placed in administrative segregation where he did not have access to telephones (Id.).

Detective James Potter, of the Kentucky State Police, testified that tapes were made of conversations in which petitioner would obtain credit cards by pretending to be a J. C. Penney's store manager (TE 293). They also obtained tapes of conversations in which petitioner ordered merchandise to be sent to Gary Mayes and would solicit others to use the false credit cards (Id.). The telephone conversations revealed that Myrna Shore in Hawthorne, California was deeply involved in the scheme (TE 293). The conversations also revealed petitioner's collaboration with inmates Richard Norris and Gary Mayes, Paul Vette in California, Billy Floyd and Mark Tennell in Louisville, and John Harlin in Owensboro (TE 293). Detective Potter identified an instruction sheet with procedures for obtaining a credit account, entitled "Computerized Instant Approval - JCP Corporation" (TE 294), found in the trash can in petitioner's cell.

Detective Potter testified that the tapes also contained a conversation in which Phillips obtained a credit card in the name of "Max Rosenberg" (TE 300). This credit card and another in the name of "Whitley" were found in the

possession of Arthur Ray Penrod, along with $1,000.00 worth of merchandise that had been obtained from Penney's (TE 301).

At the close of all evidence, the petitioner requested an instruction pursuant to RCr 9.62, to the effect that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with commission of the offense. The request was denied (TE 318).

Petitioner was convicted of criminal syndication of theft by deception and punishment was fixed at fifteen years imprisonment (TE 352). On direct appeal to the Kentucky Court of Appeals, petitioner raised four issues:

> (a) Whether the criminal syndication statute was constitutional;
>
> (b) Whether the tape recordings of petitioner's telephone conversations were obtained in compliance with Title III, 18 U.S.C. §§2510-2520;
>
> (c) Whether the evidence was sufficient to establish guilt beyond a reasonable doubt;
>
> (d) Whether the trial court erred by refusing to instruct the jury on the necessity of corroboration of an accomplice's testimony.

In an opinion rendered November 13, 1981, the Kentucky Court of Appeals held that the evidence was sufficient to support the conviction; that the tape recorded telephone conversations of petitioner did not violate federal and state wiretap statutes or the Fourth Amendment; and that a challenge to Kentucky's criminal syndication statute was not preserved. However, the Court of Appeals, citing Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981) did reverse and remand for a new trial on the basis that the jury should have been instructed pursuant to RCr 9.62, which was in effect at the time of commission of the crime but

had been abolished as of the date of trial. The Commonwealth moved for discretionary review by the Kentucky Supreme Court asserting that the trial court did not err by refusing to instruct pursuant to RCr 9.62 because there was sufficient evidence to support a conviction, independent of the accomplice's testimony (No. 82-SC-214-D). Petitioner also moved for discretionary review, arguing that the evidence was insufficient to support a conviction (No. 82-SC-216-D). This Court granted both motions for discretionary review and heard oral arguments on October 29, 1982.

On May 11, 1983, the Kentucky Supreme Court rendered an Opinion holding that the evidence was sufficient to support petitioner's conviction for criminal syndication of Theft by Deception. Commonwealth v. Phillips, Ky., 655 S.W.2d 6 (1983). The Kentucky Supreme Court also cited Murphy v. Commonwealth, Ky., 652 S.W.2d 69 (1983) which was rendered the same day as Commonwealth v. Phillips, supra. In Murphy v. Commonwealth, supra, the Kentucky Supreme Court overruled Commonwealth v. Brown, Ky., 619 S.W 2d 699 (1981) and held that the abolition of RCr 9.62 was not ex post facto when applied to crimes committed before abolition of the rule but tried after abolition. Petitioner's Petition for Rehearing was denied by the Kentucky Supreme Court on August 31, 1983.

REASON FOR NOT GRANTING THE WRIT

THE RETROACTIVE APPLICATION OF THE ABOLITION OF RCr 9.62 IS NOT VIOLATIVE OF THE EX POST FACTO CLAUSE AS SET FORTH IN ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION.

In Murphy v. Commonwealth, Ky., 652 S.W.2d 69 (1983), the Kentucky Supreme Court recognized that the abolition of a

rule requiring corroboration of accomplice testimony does not in any way change the facts that must be proved to establish guilt. Rather, that Court correctly determined that the abolition of such rule serves only to remove a restriction on the weight that may be given to accomplice testimony.

The ex post facto clause found in Article I, Section 10 of the Constitution of the United States (which was, in similar form, incorporated into Section 19 of the Kentucky Constitution) was first interpreted by the Supreme Court in Calder v. Bull, 3 U.S.(3 Dall.) 386 (1798). In a separate opinion, Justice Chase indicated the type of legislation he believed would be barred as ex post facto:

> "1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and received less, or different, testimony, than the law required at the time of the commis sion of the offense, in order to convict the offender." 3 U.S.(3 Dall.) at 390.

Justices Iredell and Paterson expressed their view that ex post facto laws are limited to those laws involving the creation or enhancement of crimes, pains and penalties. Their view was supported by definitions of ex post facto used by Blackstone and also contained in the constitutions of several states. 3 U.S.(3 Dall.) at 395-341. The only explanation Justice Chase advanced for including statutory changes in the rules of evidence within the ex post facto prohibition was the abuses of Parliament in seeking to punish certain individuals. 3 U.S.(3 Dall.) at 389. The separation of judicial and

legislative power and other protections of the American legal system would seem to prevent such abuses without resort to the ex post facto doctrine.

The ex post facto clause limits the powers of the legislature and does not apply to the judicial branch of government. Marks v. United States, 430 U.S. 188 (1977). Although due process prohibits essentially the ex post facto effect of unforseeable judicial construction of a criminal statute, Bouie v. City of Columbia, 378 U.S. 347 (1964), petitioner has failed to cite a case of precedental value to this Court that the ex post facto prohibition applies to judicial modification or repeal of rules of procedure enacted by the judiciary.

Assuming that the ex post facto doctrine applies to repeal of judicial rules of procedure, in Gibson v. Mississippi, 162 U.S. 565 (1896), the Supreme Court indicated that the accused was not entitled to be tried by the rules of evidence and procedure existing at the time an offense is committed:

> "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." 162 U.S. at 590.

The change in Kentucky's criminal rules concerning accomplice testimony is one of procedure. The abolition of a rule requiring corroboration of accomplice testimony does not in any way change the facts that must be proved to establish guilt. The elements of the crime with which petitioner was charged have not been changed by the subsequent abolition of RCr 9.62. The concept of "fair warning", as discussed in Marks v. United States, supra, does indeed underlie the ex post facto

doctrine, but such a concept is simply inapplicable to the facts presented in the instant case. The purpose of the ex post facto prohibition is that of preventing unfair and oppressive legislation. Malloy v. South Carolina, 237 U.S. 180 (1915). Nothing about the change in the rule of procedure in the case at bar is the least bit unfair. While there may be some procedural rights that are subject to the ex post facto doctrine, such rights must be truly substantial to trigger the ex post facto prohibition. See, e.g., Thompson v. Utah, 170 U.S. 343 (1898).

The rule change below was simply a procedural change making a certain class of witnesses competent without corroboration. The Supreme Court of Kentucky expressed this as follows:

> Kentucky followed the common law and permitted a conviction on the uncorroborated testimony of an accomplice until the adoption of section 239 of the criminal code in 1854 which prohibited a conviction solely upon uncorroborated testimony of an accomplice. This code provision was carried intact into subsequent criminal codes and into RCr 9.62.
>
> The effect of the code provisions and RCr 9.62 was that testimony, otherwise competent, was deemed to be incredible as a matter of law unless corroborated in some degree. With the abolition of RCr 9.62 we have returned to the procedure as it existed at common law.
>
> The change is one of procedure. It does not take less evidence to convict now than before the rule was abolished. The same facts must be established to prove murder or manslaughter now as before. The only change effected by the abolition of RCr 9.62 is that an impediment to the credibility of certain witnesses has been removed. Murphy v. Commonwealth, supra, 652 S.W.2d at 72.

At the time of petitioner's trial RCr 9.62 was already abolished and Commonwealth v. Brown, supra, had not been decided. Therefore, petitioner had no reliance on the Brown

decision and petitioner did not even make an ex post facto argument to the trial court when he requested and was denied an accomplice instruction.

In its opinion in Murphy v. Commonwealth, supra, the Kentucky Supreme Court correctly referred to Hopt v. People of Utah, 110 U.S. 574 (1884) for the principle that abolition of RCr 9.62 was simply a procedural change which removes the competency of certain classes of persons as witnesses. In Hopt, at the time of a homicide, state law prevented a convicted felon from testifying in court. At the time of the trial for the homicide, a statute had been passed that permitted felons to testify. Hopt was convicted on the basis of testimony of a convicted felon - testimony which would not have been sufficient to support a conviction at the time the offense was committed. Hopt charged that the use of a felon's testimony violated the ex post facto doctrine. This Court held that the statutory change affected matters of procedure only, in which no one can have a vested interest. In Murphy v. Commonwealth, supra, at 72-73, the Kentucky Supreme Court quoted the following portion of Hopt v. People of Utah:

> "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but -- leave untouched the nature of the crime and the amount or degree of proof essential to conviction -- only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts

> constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged. 110 U.S. at 590, 4 S.Ct. at 210.

If a statute that makes incompetent testimony competent is not violative of the ex post facto doctrine, then a rule of court that eliminates a presumption of noncredibility from the testimony of a witness is not violative of the ex post facto doctrine. See also Thompson v. Missouri, 171 U.S. 380 (1898), which involved a change in the admissibility of evidence concerning handwriting analysis.

The Supreme Court has recently taken the opportunity to express its view that changes in criminal procedure are not subject to the ex post facto doctrine. In Dobbert v. Florida, 432 U.S. 882 (1977), rehearing denied, 434 U.S. 882 (1977), the Court rejected an ex post facto challenge to a statutory change in Florida's death penalty law that redistributed sentencing powers between the judge and jury. Dobbert claimed that the laws at the time of the offense prevented the judge from increasing a jury sentence of life imprisonment to death. Dobbert received a recommended life sentence which was increased by the trial judge to death pursuant to the statute in effect at the time of the trial. The Supreme Court held that the use of the new statute at trial was not prohibited by the ex post facto clause on the independent grounds that the statutory change was procedural and that it was ameliorative. The Court also noted that a procedural change was not ex post facto merely because it worked to the defendant's disadvantage.

If a change in the sentencing powers of the judge vis a vis the jury is not a substantial enough change in the rights of a defendant to invoke the ex post facto doctrine, then a

change in a rule concerning accomplice testimony is likewise not violative of the ex post facto doctrine.

The only prohibition against the retroactive application of alteration of a rule of evidence is "a substantive change in the evidence needed to convict for the particular crime in question." People v. Dorff, Ill. App. 3d, 396 N.E.2d 827, 829 (1979). In support of this point the Court cited Beazell v. Ohio, 269 U.S. 167 (1925):

> "'[I]t is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate in a limited and unsubstantial manner to his disadvantage, are not prohibited.' (269, U.S. at 170, 46 S.Ct. at 69, 70 L.Ed. at 218)." 396 N.E.2d at 829.

In People v. Dorff, supra, a statute prohibiting evidence concerning the past sexual conduct or reputation of the alleged rape victim was enacted after the crime occurred but before trial commenced. The Appellate Court of Illinois held that application of the statute to prosecution for the offense served only to prevent the use of certain evidence relating to the alleged victim's credibility and had no bearing upon evidence relating to the crime itself. The Court held that application of the statute did not violate the constitutional prohibition against ex post facto laws. If an alteration of the rules of evidence which prevent the use of evidence relating to a witness' credibility is not violative of the ex post facto doctrine then abolition of a rule of criminal procedure eliminating the need for certain evidence relating to the credibility of a witness does not violate the ex post facto doctrine.

In the case at bar, the abolition of a rule requiring corroboration of accomplice testimony in no way affected the

amount of proof the Commonwealth was required to present to establish guilt. The testimony of alleged accomplices was still permitted prior to the abolition of the rule. The only change resulting from the abolition of RCr 9.62 was that accomplice testimony was no longer required to be corroborated. This change, therefore, served only to remove a restriction on the weight that may be given to accomplice testimony. Prior to the abolition of the rule, the jury, for all practical purposes, was still exposed to the testimony of such witnesses. There were no changes in the elements of the offense of criminal syndication of theft by deception. The prosecution was still required to submit sufficient evidence to convince a jury that petitioner had, in fact committed the crime with which he was charged. In addition to the accomplice's testimony, there was overwhelming evidence, including petitioner's confession, establishing that petitioner, with the purpose of establishing and maintaining a criminal syndicate of theft by deception, organized, managed and directed the syndicate and its activities.

When examined in light of the precedents set out above, the cases relied on by petitioner are either inapposite or unsound in their reasoning. The Kentucky Supreme Court was correct in holding that retroactive application of the abolition of RCr 9.62 did not violate the ex post facto clause.

CONCLUSION

For the reasons stated in respondent's brief, the petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

Carl T. Miller Jr.

CARL T. MILLER
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

Suzanne Guss

SUZANNE GUSS
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Carl Miller, one of counsel of respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 4, 1984, I served the petitioner with Brief for Respondent in Opposition by placing four copies of the same in the Messenger Mail addressed to Hon. Linda K. West, Assistant Public Advocate, State Office Building Annex, Frankfort, Kentucky 40601.

Carl T. Miller Jr.

CARL T. MILLER
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

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APPENDIX

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APPENDIX

Kentucky Rules of Criminal Procedure

Rule 9.62. Testimony of accomplice.---A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

Kentucky Revised Statutes, 506.120 Criminal syndicate

(1) No person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:

(a) Organize or participate in organizing a criminal syndicate or any of its activities;

(b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

(c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(d) Knowingly furnish legal, accounting, or other managerial services to a criminal syndicate;

(e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(f) Commit, or conspire or attempt to commit or act as an accomplice in the commission of, any offense of violence;

(g) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of KRS Chapters 518 or 521, or KRS 119.205, 121.025, 121.055, 524.070, 156.465, 45A.340, 63.090, 6.080, 18A.145, 244.390 or 244.600.

(2) Whoever violates this section is guilty of engaging in organized crime, which shall be a class B felony.

(3) As used in this section "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(a) Extortion or coercion in violation of KRS 514.080, 276.280, 276.310, or 521.020;

(b) Engaging in, promoting, or permitting prostitution in violation of KRS Chapter 529;

(c) Any theft offense as defined in KRS Chapter 514;

(d) Any gambling offense as defined in KRS 411.090, KRS Chapter 528, or section 226 of the Constitution;

(e) Illegal trafficking in controlled substances as prohibited by KRS Chapter 218A, in intoxicating or spirituous liquor as defined in KRS Chapters 242 or 244, or in destructive devices or booby traps as defined in KRS Chapter 237;

(f) Lending at usurious interest, and enforcing repayment by illegal means in violation of KRS Chapter 360.

KRS 514.040 Theft by deception

(1) A person is guilty of theft by deception when he obtains property or services of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

(a) Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; or

(b) Prevents another from acquiring information which would affect his judgment of a transaction; or

(c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

(d) Fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid or is or is not a matter of official record; or

(e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

(2) The term "deceive" does not, however, include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed.

(3) Deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

(4) For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid, if:

(a) The issuer had no account with the drawee at the time the check or order was issued; or

(b) Payment was refused by the drawee for lack of funds, upon presentation within thirty days after issue, and the issuer failed to make good within ten days after receiving notice of that refusal.

(5) A person is guilty of theft by deception when he issues a check or similar sight order in payment of all or any part of any tax payable to the Commonwealth knowing that it will not be honored by the drawee.

(6) Theft by deception is a Class A misdemeanor unless the value of the property, service or the amount of the check or sight order referred to in subsection (5) of this section is $100 or more, in which case it is a Class D felony.